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NO.

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 19 ____

JOHN FUNEL, Petitioner

vs.

FIDELITY & CASUALTY COMPANY OF NEW YORK, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

John Funel, your petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on September 26, 1967, wherein rehearing was refused by that Court on November 28, 1967.

Opinions below.

Fifth Circuit: The opinion of the Court below in

this case (Record, infra, Pp. 793 to 801 is reported at 383 F. 2d 42.

The ruling of the Court below denying petitioner's application for a rehearing is set forth in Record, infra, Pp. 831.

District Court: The judgment of the District Court pursuant to the jury finding is set forth in Record, infra, Pp. 652, and the opinion of the District Court which was rendered pursuant to defendants' motions for judgment notwithstanding the verdict is set forth in Record, infra, Pp. 661, 667; neither were reported.

Jurisdiction

The judgment of the District Court (Record, infra, Pp. 652) was entered on January 26, 1965. A timely motion for judgment notwithstanding the verdict or in the alternative motion for new trial was denied on September 9, 1965 (Record, infra, Pp. 661 through 666.) A notice of appeal to the Court of Appeals for the Fifth Circuit was filed on October 6, 1965, and

the Record on appeal was docketed in that Court on January 6, 1966.

2. The case was argued and submitted to the Court of Appeals, Fifth Circuit, on November 8, 1966, (Record, infra, Pp. 792.) The judgment of the Court of Appeals reversing the judgment of the District Court and rendering judgment in favor of the defendant, was entered on September 26, 1967, (Record, infra, Pp. 801.) A petition for rehearing, timely filed, was denied on November 28, 1967, (Record, infra, Pp. 831.) The jurisdiction of this Court is invoked under 28 U.S. Code, Section 1254 (1).

QUESTIONS PRESENTED

Does a reversal of a jury finding of fact due to a speculative view of the case by the Court of Appeals constitute a deprivation of the right to trial by jury under the Seventh Amendment?

Does the reliance on a patently erroneous principle of State law by the Court of Appeals in a diversity case to reverse a judgment in favor of the plaintiff

constitute a denial to the plaintiff of equal protection of the laws of the state under the Fourteenth Amendment?

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Seventh Amendment to the Constitution of the United States provides as follows:

> "In suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1652 of Title 28 of the United States Code provides as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

Article 2315 of the Louisiana Civil Code provides in pertinent part as follows:

> "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." L.S.A.-C.C. Article 2315.

The Louisiana Direct Action Statute provides in pertinent part as follows:

> "The injured person or his or her survivors or heirs hereinabove referred to, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and such action may be brought against the insurer alone or against both the insured and insurer, jointly, and in solido, in the parish in which the accident or injury occurred or in the parish in which the action could be brought against either the insured or the insurer under the general rules of venue prescribed by Art. 42, Code of Civil Procedure. This right of direct action shall exist whether the policy of insurance sued

upon was written or delivered in the State of Louisiana or not, and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana." L.S.A.-R.S.22:655.

STATEMENT OF THE CASE

This diversity case arose in the Western District of Louisiana involving an industrial accident. It entered the Federal Courts under L.S.A.-R.S. 22:655, the Louisiana Direct Action Statute.

The case was tried by a jury and resulted in a verdict by the jury in favor of plaintiff and against defendant in the sum of $75,900.00, which was later reduced to $50,000.00, the limit of insured's coverage with defendant.

Defendant's motions for directed verdict, judgment n.o.v. and/or a new trial were denied and the trial judge assigned learned written reasons (Record, infra, Pp.661-666) for this action.

Defendant appealed to the Fifth Circuit making four assignments of procedural error, none of

which interdicted the substantive sufficiency, under Louisiana law, of the proof adduced and on which the jury acted. Defendant's assignments of error were briefed and argued to the Fifth Circuit by all parties.

The Fifth Circuit reversed the verdict of the District Court, pretermitting all assignments of error indulged in its own speculation as to how the accident might have occurred (Record, infra, Pp. 799) and found not enough proof, in its judgment, to satisfy it as to defendant's insured's fault.

In petition for rehearing, pertinent portions of the transcribed testimony set forth the uncontroverted admission by an employee of defendant's insured that he created the trap injuring plaintiff (Record, infra, Pp. 809). This admission, together with other select, salient testimony, pointed out the fault of defendant in creating the trap and inviting plaintiff into the place of danger with-

out warning, whereby his injuries were incurred. The Fifth Circuit, in its reasons for reversal, speculated on "factors independant of Acme's control (which) might have caused the accident." All such speculation was dehors the record.

The Fifth Circuit, on November 28, 1967, denied the petition for rehearing (Record, infra, Pp. 831.)

REASONS FOR GRANTING THE WRIT

The decision of the Fifth Circuit effectively denies any stature to the jury's findings of fact and relegates the deliberations of that body to a mere suggested solution of a puzzle. This emasculation of the Seventh Amendment cannot possibly be the law. The clearly delineated relationship of the reviewing tribunal in reevaluating factual determinations of the jury in our Federal judicial system was recently set out in Atlantic & Gulf Stevedores vs. Ellerman Lines, Ltd., U.S. Supreme Court, 1962, 82 S.Ct. 780,

369 U.S. 355, 7 L.Ed. 2d 798, reh.den. 825 S.Ct. 1137, 369 U.S. 882, 8 L.Ed. 2d 284, motion denied 83 S.Ct. 15, 371 U.S. 803, 9 L.Ed. 2d 51, wherein this Court stated:

> "We might agree with the Court of Appeals had the question of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.'
>
> Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's findings inconsistent results in a collision with the Seventh Amendment. Arnold v. Panhandle & S.F.R.Co., 353 U.S. 360, 77 S.Ct. 840, 1 L.Ed. 2d 889. Cf. Dick v. New York Life Insurance Company, 359 U.S. 437, 446, 79 S.Ct. 921, 927, 3 L.Ed. 935."

The trial judge, who saw all of the witnesses and heard all of the evidence recognized the jurist's position vis-a-vis the jury in regard to determinations of facts when he succinctly said in refusing a judgment n.o.v.:

"Testing the evidence as we must, with all inferences most favorable to the jury verdict, we find that there was evidence which presented a jury issue as to proximate negligence on the part of Acme. This evidence consisted of testimony on the part of plaintiff as to the responsibility of Acme, and the testimony of plaintiff as to the admission of Moore, an employee of Acme, as to Moore's activities relative putting in place the plank.

The Court appreciates the clear distinction between its power to grant a judgment n. o. v. and its power to grant a new trial. The evidence here was certainly not overwhelming, but the question is: Was the verdict clearly or decidedly against the weight of the evidence? I do not think so. I am not free to re-weigh the evidence and set aside the verdict and grant a new trial merely because I might feel that other results would have been more reasonable." (Record, infra, Pp. 663, Line 10 et. seq.)

The Fifth Circuit itself recognized the constitutionally and judicially limited scope of appellate review when it stated in Massachusetts Bonding & Insurance Company v. DeBram, 5 Cir., Feb., 1962, 297 F.2d 858:

"It is not our province to determine whether the jury could have drawn different inferences or conclusions from the evidence presented or to decide what the court might have concluded or inferred if the case had been tried without a jury. Continental Casualty

Company v. Holmes, 5 Cir., 1959, 266 F. 2d 269, Cert. Den. 361 U.S. 877, 80 S. Ct. 140, 4 L. Ed. 2d 114; Gunning v. Cooley, 281 U.S. 90, 50 S. Ct. 231, 74 L. Ed. 720; DeZon v. American President Lines, Ltd., 9 Cir., 129 F. 2d 404; Boston & Maine R. R. v. Cabana, 1 Cir., 148 F. 2d 150, Cert. Den. 325, U.S. 873, 65 S. Ct. 1414, 89 L. Ed. 1991; Roth v. Swanson, 8 Cir., 145 F. 2d, 262, 265; Moore's Federal Practice, 2nd Ed., Vol. 5, at 2314-2315; Myers v. Reading Company, 331 U.S. 477, 485, 67 S. Ct. 1334, 91 L. Ed. 1615.

In considering all of the evidence, including the testimony of witnesses and the physical facts as shown by the exhibits and the testimony, we must construe the evidence most favorably to the appellees and give full effect to every legitimate inference therefrom and every reasonable conclusion based thereon. Carolina Life Insurance Company, et als v. Williams, 5 Cir., 210 F. 2d 477; Cert. granted, 348 U.S. 802, 75 S. Ct. 30, 99 L. Ed. 633; Phoenix Indemnity Company of New York v. Girouard, 5 Cir., 1958, 252 F. 2d 146; Fruit Industries, Inc. v. Petty, 5 Cir., 1959, 268 F. 2d 391; Norman Tobacco & Candy Company, Inc. v. Gillette Safety Razor Company, 5 Cir., 1959, 264 F. 2d 751."

The jurisprudence is replete with pronouncements from the United States Supreme Court and from the Circuits, wherein reviewing bodies refused to engage in searches for inferences which might not have occurred to the jury, and with hypothetical

questions which appellate judges might have posed had they been permitted to sit in the jury room.

The Fifth Circuit fell into error in this case by indulging in the temptation to be jurors. Inferences which gnawed at the Fifth Circuit were embodied in factors which "might have caused the accident," and were stated thusly by that Court in its opinion:

> "Here any number of factors independent of Acme's control might have caused the accident. Employees of the plant owner or of the building contractor may have tampered with the board after Moore replaced it. Something may have fallen on it. Or Funel may simply have stepped on it in an unusual way.." (Record, infra, Pp. 799)

Further error was occasioned by questions which piqued the curiosity of the judges and were asked by them in their reversing opinion. The doubts are these:

1) Did Moore or any other Acme employee fail to use due care in replacing the board?

2) Did the manner in which Moore replaced the board cause the accident?

3) Did some intervening force cause the board to become unstable?

It is not the nature of contested litigation that truth shall come clear as light from Sinai by Divine Revelation. The jury must seek the truth from amidst shreds and bits and pieces. The truth was found and the questions of the jury and of the Fifth Circuit were answered in the testimony of Funel and the admission of Moore. The testimony presented to the jury and contained in the transcript establishes a series of events and failures to disclose action which, coupled with the reliance of Funel thereon, constitute the culpable negligence of Acme and the proximate cause of Funel's injury.

Funel established that the board was imbedded in the corkscrew blades to his knowledge. See Stockwell cross-examination Tr. 270, Line 6 et. seq.:

"Q. And you knew that this board was just laying on these twin screws that you are talking about, isn't that right?

A. Everybody went in.

Q. Well, I am asking you if you knew it was just laying on these twin screws?

A. I knew it was in there and I knew it was imbedded and it was solid when I went in."

Funel established that the board had become imbedded over a period of weeks. See direct examination Tr. 130, Line 16 et seq.:

"Q. Do you recall the method of holding the boards still?

A. Well, the board, it had wedged in, to a certain extent. Now I couldn't say exactly how deep, but it was pretty solid, because there were so many people that went in and out of it had been in there for weeks, could be three or four or five weeks easy, maybe six, so it was pretty solid."

Funel established that the board had been in place and used by him and by Acme employees during the entire day prior to the accident. See Tr. 139, Line 8 et seq.:

"Q. Did you go into the vault?

A. Oh, yes, quite a few times.

Q. On Monday?

A. Oh, yes, sir.

Q. What means did you use to get into the vault on Monday?

A. I went in through this little door and got over the motor and over the next motor with the gear box, and turned around, stepped on the board, and got right back into the bin.

Q. That was the standard way?

A. That's the way I got in every day I went.

Q. Did you have any difficulty on Monday getting in?

A. Not a bit.

Q. When was the last time, if you recall, when was the latest time on Monday that you went into that vault?

A. We must have been in there just before knocking off time Monday evening because we were talking about this particular set-up that we were going to finish the next day.

Q. When you say 'we', please tell us who you mean, sir.

A. I was talking with Linton David that evening and Lionel Moore, he was there, and a couple of other people, I don't recall, I don t remember.

Q. When you left on Monday, had any change been made?

A. No, not a thing."

Funel established that Moore, an Acme employee, invited him into the vault on Tuesday morning and gave no warning of any change in the plank bridge. See Tr. 141, Line 20 et seq.:

"A. Then we went over some plans there and he was having a little difficulty about the control that was by the compressor in the engine room, so then we walked over to the engine room and we were going over this particular control and Lionel Moore came in there and asked me if I would come inside the vault, that he was having trouble, or the ice bin, he was having trouble, he couldn't get the deflector to line up.

THE COURT: That's Lionel Moore?

THE WITNESS: Lionel Moore, yes, sir.

THE COURT: Said, 'Come on into the vault?'

THE WITNESS: Yes, sir, or the ice bin.

THE COURT: All right, sir.

A. and I told him all right, I would be there in a little while, . . ."

Funel established in detail his means of entry into the vault, his view of the board, how he stepped on the board and how the board turned under him as a

result of its being removed from its imbedded position. See. Tr. 143, Line 11 et. seq.:

"Q. All right. Then when you were finished with your conversation with Giles about the thermometer, what happened?

A. I walked over, went through the door, got over the motor, over the gear box, turned around on the other gear box--

Q. Let me ask you: When you say 'turned around', are you standing erect on the motor?

A. Oh, no. When I would get in the box and walk in, then around and I would put my foot down to get in, you see.

Q. Were you in a standing position?

A. I was in a standing position, that's right. Then I would stoop and put my foot down to get in, because I had to go down about, oh, I would say between twenty and thirty inches, to get to the board.

Q. And you put your foot down and what happened?

A. When I put my foot down on the board, the board let go and I fell down.

Q. Now, you say you put your foot down on the board?

A. Yes, sir.

Q. Did you see the board?

A. Yeah, I saw the board before I put my foot on it; it was there.

Q. Did it look unusual?

A. Not that I could notice.

Q. Do you remember which foot you stepped on?

A. Yes, sir, my left one.

Q. Now, tell us in as much detail as you can what happened when you put your foot on the board.

A. Well, when I put my foot on the board and as I let go, to stand up to get in, the board let go and I fell over the knives, over the twin screws, and I hit my knee and turned my ankle, too; everything hurt me.

THE COURT: Just a moment, sir. I didn't quite get that. You put your foot on the board and then what happened?

THE WITNESS: Then the board turned over; it went like--you know, it tilted up sideways like, and I went over this way, you see. In other words, two screws are here and I went to this side.

THE COURT: Did you fall down? What happened? How did you fall or what?

THE WITNESS: Yes, sir, I fell down.

THE COURT: How far did you fall down?

THE WITNESS: It's only about--well, from the top of the screw down, it's only about fourteen inches, but I fell in a position that I hit my knee across these blades as I fell down. I had about three cuts, I had one above my ankle and I had about two right in the vicinity of my knee.

THE COURT: Now, as I understand it, you previously described this board I think you told me it was--you were talking to us, you didn't tell me, but in the presence of everybody else here, you testified a while ago that the board was four to six feet long?

THE WITNESS: Yes, sir.

THE COURT: It was about one inch thick and six to eight inches wide?

THE WITNESS: Yes, sir.

THE COURT: It was about one inch thick and six to eight inches wide?

THE WITNESS: I said about one and a half inches thick.

THE COURT: One and a half inches thick and six inches wide. All right.

BY MR. NELKIN:

Q. Now, when the board --

THE COURT: The board--do I understand, sir, that if this were the board, that when you stepped on it, did it go up like this, or did it go to the side like this?

THE WITNESS: It went like this, sideways; it tilted.

THE COURT: It flipped?

THE WITNESS: It flipped and went in between the blade on the edges.

THE COURT: And you fell fourteen inches?

THE WITNESS: Yeah.

THE COURT: And your knee hit the blades?

THE WITNESS: I had three cuts, three cuts that actually had a little blood on it."

Funel established the location in the vault of the two Acme employees, Moore and Taylor, neither of whom were called by Acme, despite their presence in Court. See Tr. 147, Line 16 et seq.:

"A. Yes, sir. Lionel Barrymore--I mean Lionel Moore was the first guy that was next to me when I fell down; he was the fellow that helped pick me up. And Jack

Taylor was right above where I fell, which would be roughly about twelve feet."

Funel established that Moore, the Acme employee, made the admission that he created the trap by replacing the board atop the screws. See Tr. 150, Line 6 et seq.:

"A. I said to Lionel Moore, 'What happened to the board,' and he said, 'Well, I had to replace it this morning. It wasn't in place, and I said, 'Well, why wasn't it in place, and he says, 'Well, somebody must have moved it.' He said, 'I just put it back.' "

Funel established that he could notice no difference in the condition of the board as he stepped into the vault. See Tr. 298, Line 2 et seq.:

"Q. Was it in relatively the same position on the screw that it had been the day before, or the week before?

A. It was on the screw, it was on the screw.

Q. Did you detect any difference?

A. Before I stepped in?

Q. Before you stepped in.

A. No."

Funel established that only Acme employees were in the vault. See Tr. 292, Line 6 et seq.:

"A. David's men was working on the deflectors and they had--I think they had some men on the end of the dock that might have been working on some conveyors out there, which would be Dyson's men; I am not positive, but I think they had somebody out there."

Funel established that Moore, the Acme employee, preceded him into the vault. See Tr. 278, Line 21, et seq.:

"Q. So actually, when you went there, as I understand your testimony, you went in by yourself and Lionel Moore had already been in, you would say, twenty minutes?

A. Well, I don't know if he was in there twenty minutes, but he was in there when I got in; he was already in.

Q. He wasn't going in behind you or in front of you, he was already in there?

A. He was already in, yes, sir."

Funel thus proved by sworn, uncontroverted testimony, obviously believed by the jury and by the Judge below that a condition of safety had been created and relied on, which condition was changed without warn-

ing to one peril by an employee of Acme, and Funel was invited into the situation of peril by that employee of Acme, and he sustained the injury complained of as a direct and proximate result of the causative action of the employee of Acme.

The only defense urged by the defendant was the totally disbelieved testimony of a bribe attempt.

THE SUBSTANTIVE LAW OF LOUISIANA UNEQUIVOCALLY JUSTIFIED THE JURY'S VERDICT HEREIN AND THE TRIAL JUDGE'S REFUSAL OF THE JUDGMENT NOTWITHSTANDING THE VERDICT, AND GIVES NO CREDENCE TO THE POSITION OF THE APPELLATE COURT.

The doctrine of Erie Railroad Company v. Tompkins, U.S. Sup. Ct., 1937, 58 S. Ct. 817, 304 U.S. 64, 84 L. Ed. 1188, 114 A. L. R. 1487, conformed to 98 F. Ed. 49, Cert. den. 59 S. Ct. 108, 305 U.S. 637, 83 L. Ed. 410, reh. den. 59 S. Ct. 229, 305 U.S. 673, 83, L. Ed. 436, and Section 1652 of Title 28 of the United States Code:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in Civil Actions in the Courts of the United States, in cases where they apply."

require that the decision of the Fifth Circuit herein be reversed as that decision is not conformable with the laws of the State of Louisiana as pronounced by that state's appellate courts.

Funel was representing his employer, Equitable Equipment, Inc. on the jobsite and giving advice as to installation of equipment sold by it. He was asked to answer a question requiring that he use the plank bridge which had been safely wedged. Without Funel's knowledge the condition of the bridge had been materially altered by Moore, Acme's employee, making it unsafe and a trap. This culpable action Moore confessed. Moore's statement was admitted by the trial court as an admission against interest. It was this creation of a trap which was the nexus between action

and fault. The Louisiana rule as to liability to one injured by a trap is setout in Allien v. Louisiana Power & Light Company, La. App. 3 Cir., 1967, 202 So. 2d 704, wherein that Court stated:

> "Applicable here is the rule that a person with no actual knowledge or implied knowledge of the danger has a right to rely on those who have a duty to protect his safety. This rule is stated in Norman v. Piazza, 145 So. 2d 110 (La. App. 4 Cir., 1962) as follows:
>
> > 'Moreover, in the absence of knowledge of the danger or a threat of danger, a person may rely upon the care of others who are duty bound to avoid injury to him, and, thus, he may assume that he is not exposed to or threatened by danger, which can come to him only from a breach of duty which others owe to avoid injury to him-however, such duty arises whether by statute, or from contract, or from the relationship of the parties. 65 C.J.S. Negligence, Section 118, P. 711 et seq.' "

The Louisiana Court of Appeal for the Second Circuit in Kavanaugh v. Travelers Insurance Company, La. App. 2 Cir., 1967, 203 So. 2d 780, defined "trap: as follows:

> "A 'trap' on which liability may be based involves a concealed, dangerous condition which, being unknown to a party using the premises, could not have been avoided by reasonable care."

In Foggin v. General Guaranty Insurance Company, S. Ct. La., 1965, 250 La. 347, 195 So. 2d 636, the Court considered a case where a guest asserted a claim against her host to recover for personal injury sustained on the host's property as a result of tripping over a plank nailed across a gate by the host. The Supreme Court of Louisiana found favorably for the claimant and stated:

> "Each case must be decided on its own facts and circumstances. Pilie v. National Food Stores of Louisiana, Inc., 245 La. 276, 158 So. 2d 162. We do not find that the board in the instant case constituted a trap, nor that it was a vice in construction. However, it was an obstacle and obstruction to unimpeded passage or walking through the gateway...
>
> Mrs. Catherine Foggin was not an insurer of her mother-in-law against the possibility of accident. Daire v. Southern Farm Bureau Casualty Ins. Co., La. App., 143 So. 2d 389. However,
>
> 'An invitee is a person who goes on the premises with the express or implied invitation of the occupant on the business of the latter or for their mutual advantage; and to him, the duty owed is that of reasonable and ordinary care, which includes the prior discovery of reasonably discoverable conditions of of the premises that may be unreasonably dangerous, and correction thereof

or a warning to the invitee of the danger.'

Alexander v. General Accident Fire and Life Assurance Corp., La. App., 98 So. 2d 730.

'The owner, occupant, or person in charge of property owes to an invitee the duty of exercising reasonable or ordinary care for his safety and is liable for injury resulting from breach of such duty. This duty includes that of exercising reasonable care to keep the premises in a reasonably safe and suitable condition or of warning invitees ...of hidden or concealed perils of which he knows or should know in the exercise of reasonable care, so that those whom he has invited to enter upon or use his property shall not be unnecessarily or unreasonably exposed to danger...'

Savell v. Foster, 149 So. 2d 210. (Emphasis ours.) Therefore, under the facts found and the jurisprudence, we are impelled to conclude that Mrs. Catherine Foggin was negligent in not warning her mother-in-law of the existence of the board, and that her failure to give such warning was the proximate cause of the instant accident."

The requirements of proof by Louisiana Appellate Courts of industrial accidents was strikingly set forth in Delafosse v. Industrial Painters, Inc., La. App. 3 Cir., 1967, 199 So. 2d 559:

"The accident at work can be established by the

testimony of the claimant alone, especially where as here there are corroborating circumstances. Hayes v. Louisiana Irrigation & Mill Co., La. App. 3 Cir., 168 So. 2d 396, and authorities cited. Prior compensation claims or prior injuries may be taken into account in weighing credibility as to the claimant's testimony of the present accident or disability, but nevertheless the trial court's ultimate evaluation will not be disturbed on review in the absence of manifest error. Mercantel v. White Painting Co., La. App. 3 Cir., 171 So. 2d 748...

Under these principles, we will not disturb the trial court's conclusion that the uncontradicted lay testimony and the corroborating circumstances, as well as the great preponderance of the medical testimony, support a finding of total and permanent disability resulting from an accident at work.

The defendants-appellants urge, however, that an unfavorable inference should be drawn from the claimant's failure to call a co-employee who was present when he felt the sharp onset of the back pain, in order to corroborate his testimony of the accident at work. Nevertheless, we are unable to find the claimant's failure to call this co-worker justifies reversal of the trial court's factual findings as manifestly erroneous.

In the first place, the co-employee's testimony was equally available to the employer, and there is no unfavorable inference to be drawn from a claimant's failure to call a co-employee merely to corroborate his own

testimony. Meshell v. Sabine Lumber Co., La. App. 3 Cir., 137 So. 2d 70. Further, a litigant is required only to prove his case by a preponderance of the evidence and, if as here he does so, no unfavorable inference attaches to his failure to call additional witnesses. Haynes v. Modern Woodmen of America, La. App. 3 Cir., 135 So. 2d 548. Finally, even when an unfavorable inference attaches from a failure to call a witness, by itself it will not outweigh sworn evidence accepted as credible by the trier of fact. Evers v. State Farm Mut. Auto. Ins. Co., La. App. 3 Cir., 187 So. 2d 217; Pierre v. Galloway, La. App. 1 Cir., 96 So. 2d 916."

There was evidence that an employee of the defendant altered the position of the plank bridge and knew or should have known that the board was, thus, unsafe. There was evidence that the defendant's insured was a contractor on the premises and thus occupied the premises, wherein Funel was injured. Under Louisiana law nothing more need have been established than was presented to the jury and on which the jury found liability.

It is worthy of note that the defense offered by the insurer was one of a bribe attempt which was totally rejected by the jury and wholly dis-

believed. It is also worthy of note that the application to the Fifth Circuit for review by the insurer addressed itself to procedural issues only, and at no time questioned the adequacy of proof of fault.

CONCLUSION

The decision below is patently erroneous. For the reasons stated above, this decision raises a question of general importance as to the persuasiveness of jury findings on facts, which, coupled with the gross and grievous deviation of the decision from applicable substantive law of the State of Louisiana should be reviewed by this Court. The general interest in the future position of such jury findings in the Fifth Circuit, together with the question of pure equity in the case of the injured applicant herein justify the granting of certiorari.

Respectfully submitted,

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